

**FLATHEAD COUNTY PLANNING AND ZONING
STAFF REPORT FZV-09-08
NODDING ONION LLC
REQUEST FOR ZONING VARIANCE TO PAVING REQUIREMENT
I-1H LIGHT INDUSTRIAL ZONING
JANUARY 19, 2010**

A report to the Flathead County Board of Adjustments regarding a request by Nodding Onion LLC for a variance to Section 3.28.050(1)(D) of the Flathead County Zoning Regulations requiring all private drives, access roads and required customer/employee parking areas be hard surfaced using either asphalt or concrete. The property is located in the Lower Side Zoning District and is zoned I-1H Light Industrial Highway.

The Flathead County Board of Adjustment will conduct a public hearing on this request at 6:00 p.m. on February 2, 2010 in the 2nd Floor Conference Room located at 1035 1st Ave. West, Kalispell. Documents pertaining to this application are available for public inspection at the Flathead County Planning and Zoning Office, also located on the second floor of the Earl Bennett Building.

APPLICATION REVIEW UPDATES

- **Land Use Advisory Committee**

The subject property is not located within the jurisdiction of a Land Use Advisory Committee.

- **Board of Adjustment**

A summary of the Board's deliberation and decision will be written in this space following the public hearing scheduled for February 2, 2010.

I. BACKGROUND

A. Owner/Applicant:

The Nodding Onion LLC
P.O. Box 919
Kalispell, MT 59903
(406) 755-5593
Laurel46@montanawest.com

Technical Representation:

None listed

B. Location:

The subject property is located at the southwest corner of Demersville Road and Snowline Lane, east of US Highway 93 South (see Figure 1 below). The address of the subject property is 996 Demersville Road, and the tract of land is approximately 7 acres in size.

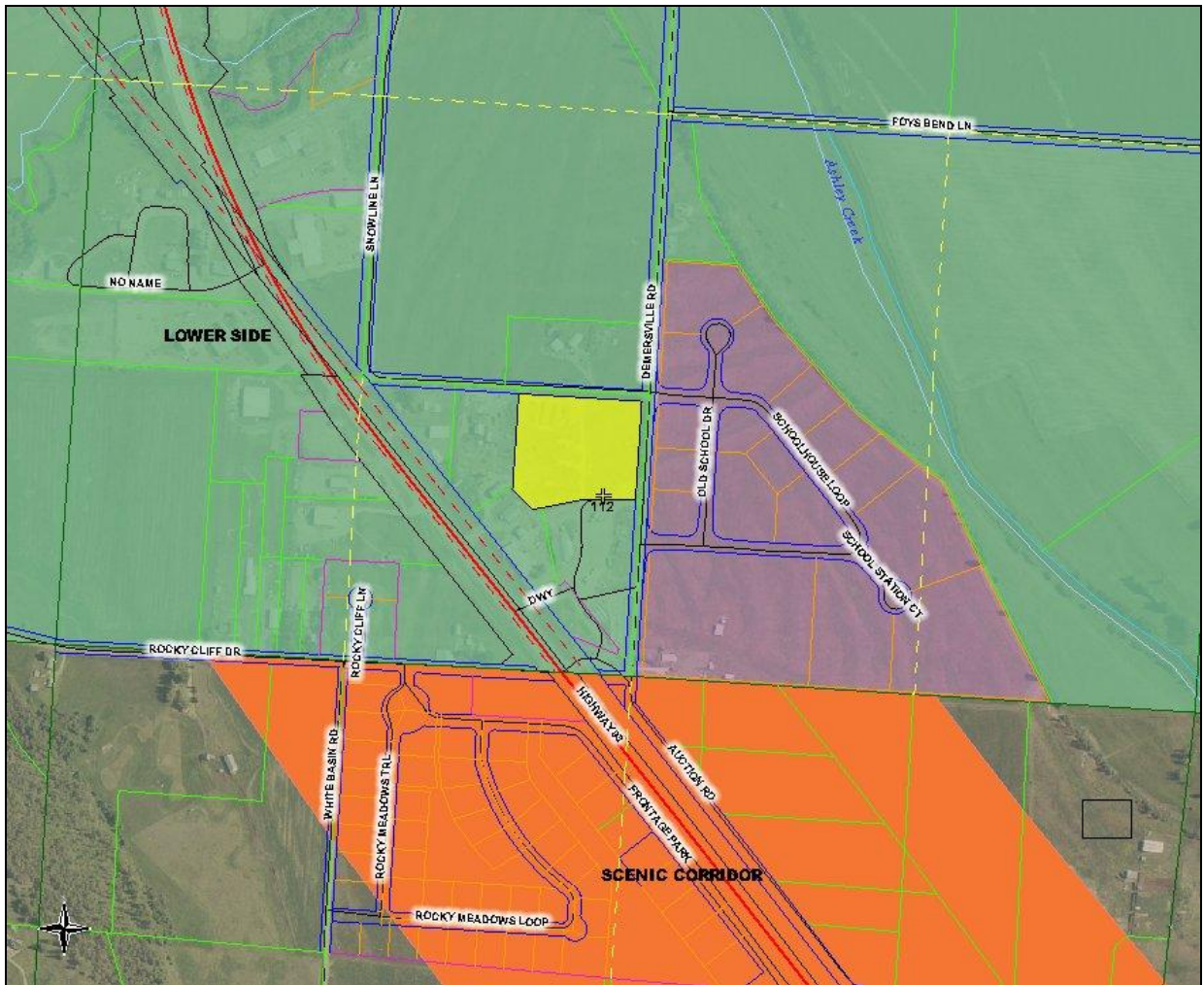


Figure 1: The subject property is highlighted in yellow.

C. Legal Description:

The subject property can legally be described as Tract 4D in the SE ¼ SW ¼ of Section 33, Township 28 North, Range 21 West, P.M.M., Flathead County, Montana.

D. Zoning:

The subject property is located in the Lower Side Zoning District and is zoned I-1H Light Industrial Highway, a designation to provide “*areas for light industrial uses and service uses that typically do not create objectionable by-products that extend beyond the lot lines. The district is intended for industrial areas which are located along state and federal highways and contain greater levels of performance and mitigation utilizing increased setbacks, landscape buffering, access control and signage restriction for the purpose of protecting the County’s major travel ways from unnecessary encroachments, limiting access points to encourage improved traffic flows and to preserve scenic corridors and entrance ways to major communities.*” Land uses surrounding the subject property are similarly industrial; the Old School Station industrial park is located across Demersville Road to the east of the subject property, a granite cutting operation is located directly west, and a lumber processing plant and propane distribution center are to the south of the property. The zoning designations for the surrounding properties include I-2 Heavy Industrial to the south and west, AG-80 Agricultural to

the north and I-1 Industrial to the east (city of Kalispell); respective zoning designations are shown in Figure 2 below.

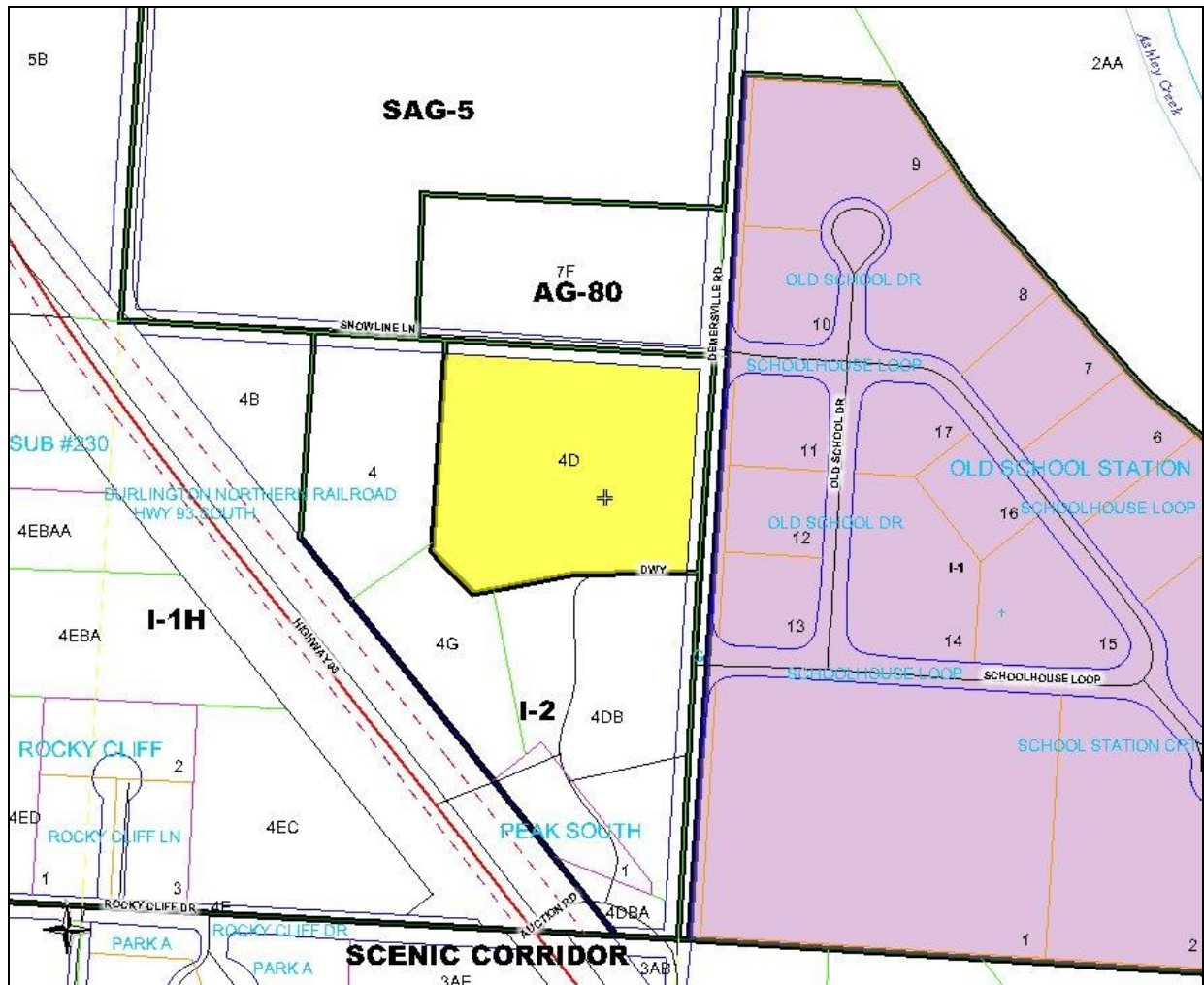


Figure 2: Existing zoning surrounding the subject property (in yellow).

E. Nature of Request:

The applicant received a Conditional Use Permit on October 6, 2009 for multiple primary uses on one tract of land. The permit was approved subject to ten (10) project-specific conditions; Condition #4 required “*all private drives, access roads and required customer/employee parking areas shall be hard surfaced using either asphalt or concrete.*” This condition refers directly to Section 3.28.050 (1) (D) of the zoning regulations, a section that identifies additional design standards for development within I-1H Light Industrial Highway zoning districts. The applicant is requesting to use alternatives such as shale application and other clean compacting techniques, as well as dust retardants, on all private drives, access roads and parking areas shown on the site plan in lieu of the paving required by the applicable zoning regulations and permit condition. Henceforth the applicant’s request will be referred to as **Alternative A**, no paving required.

Staff met with the applicant on November 16, 2009 to discuss the variance request and paving options for the property. During the Conditional Use Permit review process, specific companies/potential renters of the buildings on the property had yet to be determined; therefore

staff reviewed the proposal *generally* for the multiple primary uses proposed (shop(s), office duplex, mini storage, etc.). It was not until the public hearing regarding the Conditional Use Permit that specific uses requiring heavy equipment operations were proposed by the applicant. In light of this new information, it made sense to rethink certain aspects of the paving requirement, including paving around the perimeter of the property and near building(s) that would house the specified heavy equipment. It therefore seemed reasonable not to require pavement on the entirety of the applicant's property, but rather require paving only for the circulation areas and parking near the existing mini-storage and duplex building on the north side of the property. It should be noted that requiring only some of the property be paved is also a variance from the zoning regulations and will be reviewed as **Alternative B** using the same variance criteria as the applicant's initial proposal. A visual representation of this paving alternative is found below.

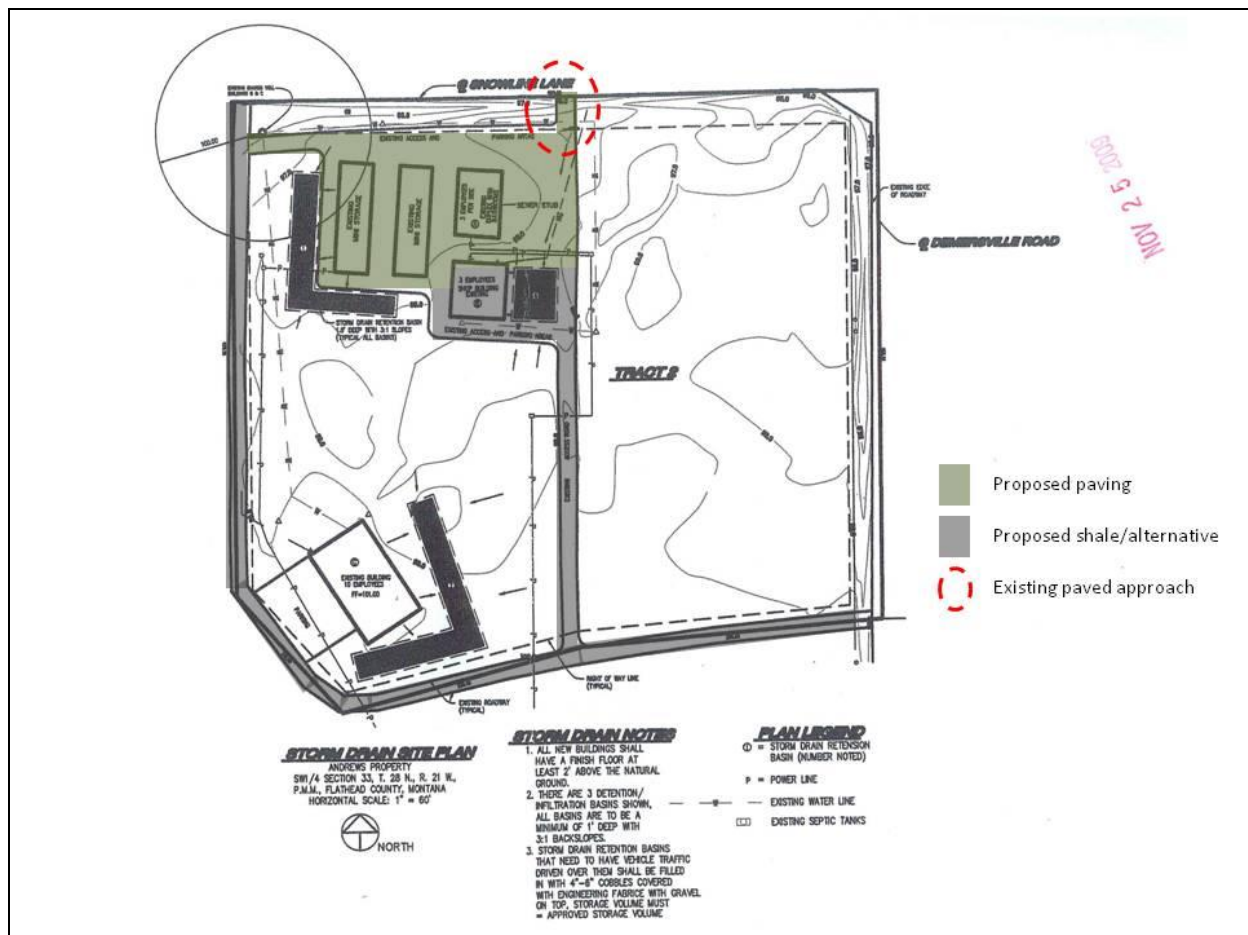


Figure 3. Alternative B – recommended paving around mini-storage and duplex buildings.

F. Public Comment:

A notice of public hearing was mailed to property owners within 150 feet of the subject property on January 8, 2010. As of the date of this report, no written public comment has been received regarding this request. Mr. Sokalowksi, a property owner to the north of Snowline Lane, stopped by the Planning and Zoning Office on January 13, 2010 to request more information about the variance, but did comment in favor or against the variance request.

Agency referrals were sent on December 23, 2009. The following written comments were

received:

- City of Kalispell
 - No comment
- Flathead County Road and Bridge Department
 - The variance will need to be approved by the Board of County Commissioners [**Staff note: Variances to zoning regulations are reviewed and approved/denied by the Board of Adjustment, not the Board of County Commissioners.*]
 - If the variance request is approved by the Commissioners, a dust mitigation plan would need to be done in place of the required pavement.
- Montana Department of Environmental Quality
 - If the variance is granted and any sanitary facilities or infrastructure (water or sewer lines, stormwater swales) need to be changes or any number of buildings or associated connections to said water/sewer need to be changed as a result of the approved variance, the development may need to get a rewrite approval through Sanitary Review.

II. EVALUATION OF REQUEST

The criteria set forth in Section 2.05 of the Flathead County Zoning Regulations were used to determine findings of fact and to evaluate the variance request as outlined below:

A. Strict compliance with the provisions of these regulations will limit the reasonable use of the property, and deprive the applicant of rights enjoyed by other properties similarly situated in the same district.

Strict compliance with the paving requirement would not limit the use of the property, although some impacts as a result of use may be considered unreasonable. The multiple uses applied for and approved in the previous Conditional Use Permit would still be able to operate, regardless of the requirement to pave the internal access roads and parking. However, the applicant contends certain uses involving heavy equipment in the existing 2,500 sq. ft. shop building and the new 6,000 sq. ft. shop building are not compatible with the paving requirement, and staff would generally agree with this assessment. While the use of heavy equipment on paving is *possible*, the applicant contends the continuous wear and tear on the paving as a result of such use would cause extremely rapid deterioration of the pavement. Based on this information, it is the recommendation of staff that paving be limited to those areas not utilized by heavy equipment (see Figure 3). By requiring the applicant pave according to **Alternative B**, the intent of the paving requirement would be met while the limitations posed by heavy equipment use would be adequately addressed.

The application states that the surrounding properties zoned for industrial uses are not paved, and by requiring the subject property to pave internal access roads and parking would deprive the applicant of rights enjoyed by other industrial properties in the area. The applicant is correct in his assessment that properties immediately adjacent to the subject property to the south and west are not paved at this time; however, these properties are not zoned I-1H, they are zoned I-2 Heavy Industrial. I-2 Heavy Industrial zoning does not require paving of internal access roads or parking areas. In actuality, *most* of the industrial properties within the Lower Side Zoning District that are similarly zoned I-1H have paved driveways, access roads and parking areas. The figure below illustrates the properties that are paved, as required, in the same general area as the subject property.

The variance requesting no pavement, **Alternative A**, does not address the fact that other properties similarly zoned and located within the same zoning district are paved according to the

requirements. However, heavy equipment use on portions of the subject property are more similar to uses on adjacent I-2 Heavy Industrial properties, and would be limited if paving were required in these areas. Therefore, strict compliance with the paving requirements could deprive the applicant of some rights enjoyed by property owners directly adjacent to, and sharing access with, the subject property. However, similar properties zoned I-1H and located in the same district have been required to pave according to the regulations. **Alternative B** addresses the potential deprivation of rights enjoyed by adjacent properties zoned I-2 while still fulfilling a portion of the paving requirement of the I-1H zoning district.

Finding 1: Strict compliance with the regulations would limit the reasonable use of portions of the property because the use of heavy equipment in some areas has the potential to degrade paving faster than typical vehicle traffic. These limitations would be addressed by granting a variance with the condition that those areas not subject to heavy equipment be paved (**Alternative B**).

Finding 2: Strict compliance with the regulations would deprive the applicant of rights enjoyed by adjacent properties zoned I-2 but would not deprive the applicant of rights enjoyed by similar properties zoned I-1H and located in the Lower Side Zoning District. Requiring the applicant pave according to **Alternative B** would address inconsistencies between heavy industrial equipment use on the subject property compared to neighboring properties, but would fulfill the paving requirement as fulfilled by similar properties zoned I-1H with similar light industrial uses located in the same zoning district.



Figure 4: Properties in the Lower Side Zoning District zoned I-1H and paved according to the zoning regulations.

B. The hardship is the result of lot size, shape, topography, or other circumstances over which the applicant has no control.

There are two separate discussions with regard to this criterion. The first focuses on the paving that would be required along the south and west property boundaries and around the two new(er) shop buildings proposed to house heavy equipment. In this instance, the hardship is not the result of lot size, shape or topography. Paving the shared access easements along the south and west property boundaries would involve cooperation with adjacent property owners and would not be a circumstance over which the applicant has complete control. Properties to the south and west are zoned I-2 Heavy Industrial, a zoning designation that does not require paving for internal access roads or parking areas. It would seem unreasonable to require paving for these access easements that will be used primarily for heavy equipment (as discussed above) and that are equally utilized by properties zoned for heavy industrial uses that do not require paving onsite. However, the access apron onto Snowline Lane has been paved according to County Road and Bridge standards and serves the two mini-storage buildings and the duplex on the north side of the property. This access is under complete control of the applicant, and would not be utilized for heavy equipment traffic but rather employee and customer traffic accessing these buildings on a regular/semi-regular basis. The applicant would have control over the paving on this portion of the property, in line with staff's proposed **Alternative B**, which leads into a separate discussion of topographic limitations below.

The second discussion deals with hardship as it relates to topography onsite, specifically with regard to the mini-storage units and duplex building on the north side of the property where staff is proposing paving **Alternative B** to address this review criteria. These three buildings were in existence at the time the applicant purchased the property. The application states these buildings sit in low areas, have required extensive drain tile work to mitigate stormwater onsite, and that paving around these three buildings would result in "substantial drainage complications". The applicant provided comment from KG Contracting Inc. stating "the property at this location is so much lower in elevation than the existing roads and topography it makes it impossible to pave the existing area without extreme drainage complications that are likely not solvable."

Upon visit to the site, it appeared the structures do sit slightly below road grade (see Figure 5). However, the topography around the three buildings is generally flat, with an elevation change of about a foot from the eastern-most duplex building sloped toward the western-most mini-storage unit and stormwater detention basin. This basin is one of three reviewed and approved by MDEQ for managing stormwater onsite. The building foundations appear to sit at or slightly above grade, and it would seem that with some limited excavation there are options available to engineer stormwater drainage toward the retention basin located immediately west and south of the mini-storage units (see Figure 7). A professional assessment from a licensed engineer would be needed to determine whether or not paving around these structures would be 'impossible', as stated by the applicant. Absent this assessment, it would appear paving around these structures pursuant to **Alternative B** would not be a significant hardship.



Figure 5: Topography onsite; (Snowline Lane to the right).



Figure 6: Example of topography between buildings.



Figure 7: Topography sloping away from mini-storage units, west toward retention basin.

Finding 3: The applicant does not have complete control over the access easements along the west and south property boundaries, and these shared easements could pose a hardship to the applicant if required to pave the entire site. The applicant has full ownership and control of the paved access onto Snowline Lane and the parking and circulation areas surrounding the mini-storage units and duplex building, therefore no hardship exists with regard to ownership or control were a variance granted and the applicant required to pave this area in accordance with **Alternative B**.

Finding 4: The applicant states the hardship in paving around the mini-storage and duplex buildings results from topography onsite and potential drainage complications that may result from paving these areas. However, this does not appear to be a significant topographic hardship because the areas recommended paved in **Alternative B** could be engineered to address the modest change in topography and to manage stormwater onsite.

C. The hardship is peculiar to the property.

The subject property is zoned I-1H Light Industrial Highway, a zoning designation that requires internal driveways, access roads and parking be paved on properties within a highway corridor. The applicant states surrounding industrial properties are not paved and are not required to be paved, making the paving request for the subject property unique. The adjacent properties to the south and west are not currently paved, nor would they be required to be paved because they are zoned I-2 Heavy Industrial. The paving requirement may be peculiar based on the property's immediate surroundings, but is not peculiar to the subject property based on properties similarly zoned I-1H in the zoning district. Similar properties have been paved according to the zoning requirements, as previously shown by Figure 4. Requiring pavement in areas identified by **Alternative B** addresses the property's unique location and shared access to

adjacent to properties zoned I-2 for heavy industrial uses while still meeting the intent of the design standards for properties zoned I-1H and utilized for lighter industrial uses in highway corridors.

Finding 5: The paving requirement is somewhat peculiar to the property because adjacent properties to the south and west share access easements with the subject property but are zoned for heavy industrial uses which do not require paving. If a variance were granted, **Alternative B** would require areas of the subject property that do not share access easements with properties zoned for heavy industrial uses be paved according to the regulations because these areas are not peculiar to the property when compared to other properties zoned I-1H.

D. The hardship was not created by the applicant.

The mini-storage units and duplex building were existing at the time the applicant purchased the property. The applicant has chosen to operate or rent to industrial business utilizing heavy equipment on the subject property; however, these uses have been reviewed and approved for the subject property and are appropriate given the industrial zoning designation. Since the uses previously reviewed under the Conditional Use Permit are all permitted in I-1H zones, it is unreasonable to say the applicant created the hardship by choosing to utilize his property for the uses permitted under the existing zoning.

Finding 6: The hardship was not created by the applicant because the mini-storage units and duplex existed at the time the property was purchased and the use of heavy equipment is tied to uses permitted within the I-1H zoning district itself.

E. The hardship is not economic (when a reasonable or viable alternative exists).

The presence of heavy equipment traffic along the south and west easements, as well as to and from the shop buildings on the subject property, presents a logistical and maintenance hardship that is not based solely on economics. The applicant has stated that in order for paving to succeed in these areas it would require extensive reinforcement to accommodate the loading and friction created by continuous heavy equipment traffic. The easements along the south and west property boundaries are shared with adjacent properties owners and not wholly under the control of the applicant, physically or financially.

The applicant has stated the hardship incurred from the requirement to pave around the mini-storage buildings and duplex is not economic because it would be “impossible to pave the existing area without extreme drainage complications that are likely not solvable” (taken from the KG Contracting Inc. quote sheet). Given previous discussion under Section B, it would appear there are options available to manage stormwater onsite were the circulation and parking areas for these three buildings required to be paved according to the regulations. While these options may cost more money to engineer and approve, they would not be impossible and are purely economic. Staff spoke with Jarrod Mohr from Montana DEQ to confirm that the options available to the applicant were both reasonable and viable were the applicant required to pave the areas recommended in **Alternative B**. According to Jarrod, the existing stormwater retention basin(s) may be able to accommodate the additional run-off *without* going through re-review by the Department of Environmental Quality. Were the existing run-off basin unable to accommodate additional stormwater run-off resulting from increased impervious surface, a re-review of the property would be necessary.

Finding 7: The hardship is not solely economic because the heavy equipment utilized by the applicant and neighboring property owners would create maintenance issues were pavement applied in areas around the shop buildings and along shared access easements utilized by

neighboring properties zoned I-2 Heavy Industrial.

Finding 8: The applicant's variance request as it pertains to paving around the mini-storage and duplex building is based on economic hardship and the applicant's belief that pavement would be impossible given the existing topography and potential cost of engineering and re-review. This aspect of the variance request not meeting the above criteria could be addressed by granting the variance and requiring the applicant pave according to **Alternative B** recommended by staff.

F. Granting of the variance will not adversely affect the neighboring properties or the public.

Pavement reduces dust and particulate matter in the air and improves travel surfaces for the general public, a benefit to health and safety for the employees as well as customers and surrounding community. The applicant has proposed alternatives to paving that would include dust retardants and other mitigation techniques that would alleviate the impact to air quality. Granting of the variance would not change the current conditions of the site; however, requiring a portion of the site be paved according to the regulations has the potential to improve air and travel surface quality onsite.

Finding 9: The granting of the variance would not adversely impact neighboring properties or the public because the applicant has proposed alternatives to paving that include dust mitigation measures, and the overall aesthetics of the property would not change significantly from what is currently in place.

G. The variance requested is the minimum variance that will alleviate the hardship.

The applicant has requested an alternative paving application be applied to all of the internal access roads and required parking areas onsite. By requesting no paving be required for the entire site, the applicant has requested the maximum variance allowable under the circumstances. Given the use of heavy equipment on certain portions of the site, it is staff's recommendation that the paving requirement only apply to the circulation and parking areas surrounding the duplex and mini-storage units (**Alternative B**). **Alternative B** would be the minimum variance necessary to alleviate the hardship.

Finding 10: The applicant has requested the maximum variance possible to alleviate hardship on the property because a reasonable alternative to no paving exists. This criteria could be met by granting a variance conditioned to require pavement as recommended by staff in **Alternative B**; this would be the minimum variance necessary to alleviate the hardship.

H. Granting the variance will not confer a special privilege that is denied other similar properties in the same district.

As previously discussed, most properties that are similarly zoned I-1H in the Lower Side Zoning District were observed to be paved as required by the regulations. Properties immediately adjacent to the subject property are not paved; however, these properties are zoned I-2 Heavy Industrial, a designation that does not require paving. It is understood that some uses on the subject property utilize heavy equipment that would degrade pavement application, and would be better suited for paving alternatives such as shale and dust retardants. These uses would be limited to the two new(er) shop buildings onsite and would utilize the access easements shared by the properties zoned for heavy industrial uses. Granting a wholesale variance to the paving requirement would confer a special privilege to the applicant because other properties similarly zoned I-1H in the zoning district are paved as required by the zoning regulations. However, requiring the areas utilized by heavy equipment be paved would place a burden on the applicant that is not required of the properties sharing these easements but zoned for heavy industrial.

Finding 11: The granting of the variance as requested by the applicant (**Alternative A**) would confer a special privilege that is denied other similar properties because many of the tracts zoned I-1H in the Lower Side zoning district are paved according to the requirements of the zoning regulations. However, the granting of a variance request conditioned to require the applicant pave only a portion of the property (**Alternative B**) would not confer special privilege because the applicant would be required to pave the areas not utilized by or shared with heavy equipment/heavy industrial uses, that are similar in use to other properties located in the Lower Side zoning district, zoned I-1H and currently paved.

III. FINDINGS

1. Strict compliance with the regulations would limit the reasonable use of portions of the property because the use of heavy equipment in some areas has the potential to degrade paving faster than typical vehicle traffic. These limitations would be addressed by granting a variance with the condition that those areas not subject to heavy equipment be paved (**Alternative B**).
2. Strict compliance with the regulations would deprive the applicant of rights enjoyed by adjacent properties zoned I-2 but would not deprive the applicant of rights enjoyed by similar properties zoned I-1H and located in the Lower Side Zoning District. Requiring the applicant pave according to **Alternative B** would address inconsistencies between heavy industrial equipment use on the subject property compared to neighboring properties, but would fulfill the paving requirement as fulfilled by similar properties zoned I-1H with similar light industrial uses located in the same zoning district.
3. The applicant does not have complete control over the access easements along the west and south property boundaries, and these shared easements could pose a hardship to the applicant if required to pave the entire site. The applicant has full ownership and control of the paved access onto Snowline Lane and the parking and circulation areas surrounding the mini-storage units and duplex building, therefore no hardship exists with regard to ownership or control were a variance granted and the applicant required to pave this area in accordance with **Alternative B**.
4. The applicant states the hardship in paving around the mini-storage and duplex buildings results from topography onsite and potential drainage complications that may result from paving these areas. However, this does not appear to be a significant topographic hardship because the areas recommended paved in **Alternative B** could be engineered to address the modest change in topography and to manage stormwater onsite.
5. The paving requirement is somewhat peculiar to the property because adjacent properties to the south and west share access easements with the subject property but are zoned for heavy industrial uses which do not require paving. If a variance were granted, **Alternative B** would require areas of the subject property that do not share access easements with properties zoned for heavy industrial uses be paved according to the regulations because these areas are not peculiar to the property when compared to other properties zoned I-1H.
6. The hardship was not created by the applicant because the mini-storage units and duplex existed at the time the property was purchased, and the use of heavy equipment is tied to uses permitted within the I-1H zoning district itself.
7. The hardship is not solely economic because the heavy equipment utilized by the applicant and neighboring property owners would create maintenance issues were pavement applied in areas

around the shop buildings and along shared access easements utilized by neighboring properties zoned I-2 Heavy Industrial.

8. The applicant's variance request as it pertains to paving around the mini-storage and duplex building is based on economic hardship and the applicant's belief that pavement would be impossible given the existing topography and potential cost of engineering and re-review. This aspect of the variance request not meeting the above criteria could be addressed by granting the variance and requiring the applicant pave according to **Alternative B** recommended by staff.
9. The granting of the variance would not adversely impact neighboring properties or the public because the applicant has proposed alternatives to paving that include dust mitigation measures, and the overall aesthetics of the property would not change significantly from what is currently in place.
10. The applicant has requested the maximum variance possible to alleviate hardship on the property because a reasonable alternative to no paving exists. However, this criteria could be met by granting a variance conditioned to require pavement as recommended by staff in **Alternative B**, which would be the minimum variance necessary to alleviate the hardship.
11. The granting of the variance as requested by the applicant (**Alternative A**) would confer a special privilege that is denied other similar properties because many of the tracts zoned I-1H in the Lower Side zoning district are paved according to the requirements of the zoning regulations. However, the granting of a variance conditioned to require the applicant pave only a portion of the property (**Alternative B**) would not confer special privilege because the applicant would be required to pave the areas not utilized by or shared with heavy equipment/heavy industrial uses, that are similar in use to other properties located in the Lower Side zoning district, zoned I-1H and currently paved.

IV. RECOMMENDATION

Section 2.05.030 (3) of the Flathead County Zoning Regulations states a variance shall not be granted unless all of the review criteria are met or found to be not pertinent to a particular application. The variance request fails to meet all eight criteria as submitted by the applicant (**Alternative A**); however, if the variance request were conditioned as recommended by staff (**Alternative B**), the request would meet the eight criteria reviewed. Therefore staff recommends the Flathead County Board of Adjustment adopt staff report FZV-09-08 as Findings of Fact and approve the request for a variance to the paving requirements in Section 3.28.050(1)(D) of the Flathead County Zoning Regulations, subject to the following condition:

1. The applicant shall pave the internal circulation and parking areas surrounding the two mini-storage units and duplex building, as required by Section 3.28.050(1)(D), up to the existing paved approach onto Snowline Lane as recommended by staff and exhibited in Figure 3 of this report.